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Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

October Term, 1985

FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,
Petitioners,

vs.

CITY OF MIAMI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

I.

ARE THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION AND *MILLER V. CALIFORNIA*, 413 U.S. 15, 93 S.Ct. 2607 (1973) VIOLATED, WHERE THE COURT, IN A CIVIL NON-JURY TRIAL, MAKES A FINAL DETERMINATION THAT CERTAIN PRESUMPTIVELY PROTECTED MATERIALS ARE OBSCENE WITHOUT ANY EVIDENCE AS TO CONTEMPORARY COMMUNITY STANDARDS?

PARTIES BELOW

The parties to the proceeding in the Supreme Court of Florida and the Court whose judgment is sought to be reviewed are the parties before this Court.

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CITY OF MIAMI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at 486 So.2d 569 (Fla. 1986). The Opinion of

the Third District Court of Appeals is reported at 460 So.2d 1028 (Fla. 3rd DCA 1985). These opinions are reproduced in the Appendix to this Petition at App. 1 (App. Pg. 1) and App. 2 (App. Pg. 14).

JURISDICTION

The judgment sought to be reviewed by Writ of Certiorari was dated and entered April 3, 1986. The statutory provision which confers jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Respondent commenced this action by filing two separate civil complaints in the trial court against Petitioner. The complaints, subsequently consolidated for appeal purposes, sought injunctive relief against Petitioner and a total of eight (8) magazines under the provisions of Section 847.011(8), Florida Statutes (1981). Florida Statute §847.011(8) confers upon Florida trial courts jurisdiction to enjoin the sale or distribution of obscene materials.

Temporary restraining orders, followed by temporary injunctions, were entered in both cases prohibiting Petitioner from selling or distributing the magazines pending final hearings on the merits of the complaints.

At both final hearings, following the presentation of Respondent's case, Petitioner moved for a directed verdict on the ground that Respondent had failed to meet its burden of proof as a matter of law by virtue of its failure to offer any testimony establishing the "contemporary community standards" of Dade County, Florida, in these non-criminal, non-jury trials. The courts reserved ruling on the motions. The courts further refused, despite inquiry made by counsel for Petitioner, to advise the parties as to whether or not the court was competent to determine the "contemporary community standards" of Dade County, Florida, and thereby enable it to make a valid decision on the obscenity *vel non* of the magazines.

Ultimately, the trial courts entered Final Judgments granting permanent injunctions, thereby according Respondent the relief sought.

Petitioner appealed these Final Judgments to the State of Florida Third District Court of Appeals. The District Court of Appeals reversed the trial courts' Judgments and held:

> . . . [A]bsent a presentation to the trial court of testimony defining contemporary community standards of obscenity, the evidence was insufficient to support the trial court's ruling that the materials in question are obscene.

Florida Literary Distributing Corp. v. State, 460 So.2d 1028, 1029 (Fla. 3rd DCA 1985).

Respondent appealed the Court of Appeal's decision to the Supreme Court of Florida. The Supreme Court of Florida overturned the Third District's decision and held that the presentation of testimony defining "contemporary community standards" was not required in a civil, non-jury proceeding to determine the obscenity *vel non* of materials.

REASONS FOR GRANTING THE WRIT

I.

BY HOLDING THAT IT IS NOT NECESSARY TO PRESENT EVIDENCE OR EXPERT TESTIMONY OF "CONTEMPORARY COMMUNITY STANDARDS" IN CIVIL NON-JURY TRIALS TO DETERMINE THE OBSCENITY *VEL NON* OF PRESUMPTIVELY PROTECTED MATERIALS, THE SUPREME COURT OF FLORIDA HAS UNDERMINED THE DECISION IN *MILLER V. CALIFORNIA*, 413 U.S. 15, 93 S.CT. 2607 (1973) AND VIOLATED THE FREE SPEECH GUARANTEES OF THE FIRST AND FOURTEENTH AMENDENTS TO THE CONSTITUTION.

In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), this Court defined the test for obscenity as follows:

> The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, 408 U.S., at 230, 92 S.Ct., at 2246, quoting *Roth v. United States, supra*, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. 2615.

In commenting on the rationale behind the "contemporary community standards" aspect of the test for obscenity (i.e. subparagraph (a) of the *Miller* test), this Court in *Miller* noted:

> As the court made clear in *Mishkin v. New York*, 383 U.S., at 508-509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See *Roth v. United States*, *supra*, 354 U.S. at 489, 77 S.Ct., at 1311. Cf. the now discredited test in *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360. We hold that the requirement that the jury evaluate the materials with reference to 'contemporary standards of the state of California' serves this protective purpose and is constitutionally adequate. (Footnote omitted).

Id. 413 U.S. 33-34, 93 S.Ct. at 2620.

It is therefore clear that, in promulgating a minimum constitutional test for obscenity, this Court emphasized the requirement of a jury in order to insure that a determination of the obscenity *vel non* of the materials in question be in fact determined by "the average person, applying contemporary community standards." *Miller v. California*, 413 U.S. 124, 93 S.Ct. at 2615. See, also,

Roth v. United States, 354 U.S. 467, 489, 77 S.Ct. 1304, 1311 (1975).

The Supreme Court of Florida's decision, that evidence of "contemporary community standards" is not required in civil, non-jury trials to determine the obscenity *vel non* of certain presumptively protected materials, violates the mandate in *Miller*. The basic premise underlying *Miller* was that only the consensus of a jury, comprised of a cross-section of the community, could determine whether materials violated "contemporary community standards" and thus were subject to suppression. That one individual—judge or lay person—be permitted to make such a determination without the benefit of evidence as to "contemporary community standards" is clearly not consistent with this proposition.

In *United States v. Thomas*, 613 F.2d 787, 791-792 (10th Cir. 1980), the Tenth Circuit Court of Appeals discussed the role of the jury in the context of an obscenity case:

> A finding of obscenity must rest, *inter alia*, on a determination that 'the average person', in applying 'contemporary community standards' to the material taken as a whole, would determine that such 'appeals to the prurient interest'. *Miller v. California, supra*, 413 U.S. at 24, 93 S.Ct. 2607. Obscenity is thus considered to be contextual, in that differences in the contemporary standards of different communities create different conclusions as to obscenity. 'People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed

uniformity.' *Miller v. California, supra* at 33, 93 S.Ct. at 2620.

Additionally, local community standards are appropriate because they are more cohesive and concrete than any hypothetical national standard.

When the allegedly obscene materials are placed into evidence, the juries' overall background, including their familiarity with their communities' standards renders expert testimony unnecessary, if not irrelevant. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). *Of course, this benefit occurs only when, as here, the jury is from the community whose standards are applicable. Otherwise, capturing and conveying a community's 'contemporary standards' vis-a-vis expert testimony is required, a difficult task at best.* See *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976). [Emphasis added].

It is important to note it is not the civil, injunctive procedure utilized by the Respondent which Petitioner claims suffers from constitutional infirmity, but instead the absence of a jury during those proceedings which infringes on Petitioner's constitutional rights. As the dissenting justices in the Supreme Court of Florida noted, ". . . to allow jury trials in such cases would obviate the problem of evidence of contemporary community standards." *City of Miami v. Florida Literary Distributing Corporation*, 486 So.2d 569, 574 (Fla. 1986) (Boyd, J. dissenting). It is clear that the collective, overall background of individual jurors is a fundamental ingredient in the determination of "contemporary community standards". To allow a single elected judge

to make that determination vests unlimited censorship power in one subjective mind. This result clearly violates *Miller* and the First Amendment, as applied to the States by the Fourteenth Amendment to the Constitution.

In addition, as pointed out by the Supreme Court of Florida, there has been "no express guidance from the United States Supreme Court" on this issue. *Florida Literary*, 486 So.2d at 573. The Court stated that it based its decision on a seemingly *questionable legal fiction* "that there is an objective contemporary community standard, that a jury looks to that contemporary community standard, and that a judge is just as competent as six jurors to be on notice of that objective standard." The Supreme Court of Florida further noted that it is a *dubious assumption* that a sole judge can "ascertain the contemporary standards of the community wherein they sit." *Id.* at 572.

The Supreme Court of Florida was admittedly "hesitant" to hold the way it did. Without express guidance from this Court, it based its decision on what it acknowledged were *"questionable"*, *"dubious"* and *"tenuous"* propositions. This Court should grant Certiorari so that there is uniform application of State laws under the First Amendment, based on *certain*, *unequivocable*, and *firm* principles of law.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to the Supreme Court of Florida, reverse that Court's decision, and render an opinion requiring presentation of evidence, or expert testimony, in all civil non-jury trials in which the obscenity *vel non* of presumptively protected materials is questioned.

Respectfully submitted,

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Appendix

APPENDIX 1

CITY OF MIAMI,

Petitioner,

v.

FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,

Respondents.

No. 66573.

Supreme Court of Florida.

April 3, 1986.

City sought injunctive relief to stop distribution of allegedly obscene magazines. The Circuit Court, Dade County, David L. Levy and Joseph M. Nadler, JJ., issued permanent injunctions. Distributor appealed. The District Court of Appeal, 460 So.2d 1028, reversed and remanded. Application for review was granted based on direct conflict of decision. The Supreme Court, Ehrlich, J., held that evidence of contemporary community standards was not required to assist judge in making determination whether average person would consider magazines obscene.

Decision quashed and remanded.

Boyd, C.J., dissented and filed opinion joined by Shaw, J.

1. Obscenity —16, 17

Parties in obscenity case may introduce relevant evidence of community standards, but trier of fact may disregard evidence of community standard and rely exclusively on knowledge of views of average person in community when making determination whether material is obscene. U.S.C.A. Const.Amend. 1.

2. Obscenity —17

Evidence of contemporary community standards was not required to assist judge at injunction proceeding in making determination whether average person would consider magazines obscene. U.S.C.A. Const. Amend. 1.

3. Courts —216

Direct conflict existed between obscenity decisions requiring use of expert testimony as to community standards and obscenity decision not requiring expert testimony so as to confer appellate jurisdiction upon Supreme Court. West's F.S.A. Const. Art. 5, § 3(b)(3).

Lucia A. Dougherty, City Atty. and Gisela Cardonne, Deputy City Atty. and Leon M. Firtel, Asst. City Atty., Miami, for petitioner.

Joel Hirschhorn, Miami, and Harry M. Solomon, Miami, for respondents.

EHRLICH, Justice.

This case is before us for review of a decision by the Third District, *Florida Literary Distributing Corp. v. State ex rel. Garcia-Pedrosa*, 460 So.2d 1028 (Fla. 3d DCA 1985). The opinion below requires expert testimony regarding contemporary community standards in obscenity cases, and is in direct and express conflict with *Collins v. State Beverage Department*, 239 So.2d 613 (Fla. 1st DCA 1970), and *Mitchum v. State*, 251 So.2d 298 (Fla. 1st DCA 1971). As discussed *infra*, we have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

The City of Miami sought injunctive relief to stop distribution of a total of eight magazines. At the circuit court level, the city proceeded against four magazines each in two separate actions. Florida Literary Distributing Corp. ("Florida Literary") moved for directed verdicts after the city presented its case in both hearings, arguing that the city had not presented expert testimony to establish the community standards of Dade County. The circuit court judges issued permanent injunctions in both cases. The district court of appeal reversed the lower courts in a consolidated opinion, holding that testimony defining contemporary community standards of obscenity was required when the party defendant has no right to a jury trial. We disagree with the district court and quash the decision.

The question before us is not whether the eight magazines are obscene, but whether the trial judge, acting as a finder of fact in a proceeding where the defendant has no right to a jury trial, must be apprised of contemporary community standards by evidence presented by the governmental entity seeking to establish obscenity. To understand the issues clearly, we must look to the current first amendment doctrine vis-a-vis

regulation of obscenity. That doctrine is grounded in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The first amendment will not protect obscene publications. To determine what is obscene, the trier of fact must decide

> (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. at 2615 (citations deleted). The problem before us arises from the first of the three *Miller* elements regarding contemporary community standards. A trier of fact must determine that a work appeals to prurient interests, but an objective standard is utilized, i.e., an average person applying contemporary community standards. Thus, a trier of fact cannot rely on his own standard of prurient interest, but rather must look to the average person in the community.

There can be no doubt that when a jury is asked to apply the *Miller* test, the jury is deemed competent to determine what the contemporary community standards are and how an average person would apply them. There is no constitutional requirement that evidence of the contemporary community standards be placed in the

record. This was the holding in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), decided the same day as *Miller*.

Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. The films, obviously, are the best evidence of what they represent.[6] "In the cases in which this Court has decided obscenity questions since *Roth [v. United States*, 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498] (1957)], it has regarded the materials as sufficient in themselves for the determination of the question."

> 6. This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. "Simply stated, hardcore pornography . . . can and does speak for itself." We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

413 U.S. at 56, 93 S.Ct. at 2634 (citations deleted).

The argument of Florida Literary is best summed up in the opinion of the Fifth District in *Golden Dolphin*

No. 2, Inc. v. State, Divison of Alcoholic Beverages & Tobacco, 403 So.2d 1372 (Fla. 5th DCA 1981), wherein the court reviewed an administrative order finding a performance in a bar obscene and suspending the bar's liquor license for 45 days.

> With regard to the question of whether there was substantial competent evidence to support the hearing officer's finding that the show was obscene, the Golden Dolphin contends on appeal, as it did at the hearing, that since there was no evidence submitted to the hearing officer as to the contemporary community standards of the area, there was insufficient evidence to support a finding that the dance was obscene. We agree.
>
> . . . .
>
> The decision as to what are the community standards must come from either the prior knowledge of the trier of fact or through knowledgeable witnesses. This decision usually arises in the context of a criminal trial where the defendant exercises his right to a jury trial. *The jury is supposed to be a cross-section of the community and thus knowledgeable of the community standards. Therefore, independent testimony is not necessary to enable a jury to judge the obscenity of material which has been placed into evidence. Hamling v. United States*, 418 U.S. 87 [94 S.Ct. 2887, 41 L.Ed.2d 590] (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 [93 S.Ct. 2628, 37 L.Ed.2d 446] (1973). However, such independent testimony may be presented if a party so desires.

> If a defendant waives his right to a jury and is tried by a judge, it is logically arguable that such defendant cannot complain that the judge is unrepresentative of the community. But if that judge affirmatively asserts his incapacity to discern community standards in the absence of evidence thereof, then it would be incumbent upon the state to present such evidence at trial.
>
> In the case at hand, the proceeding was a civil administrative hearing and, therefore, there was no right to a jury trial. No opportunity for a jury trial was provided. Instead, the Golden Dolphin was tried by a hearing officer, and no evidence was presented on the subject of contemporary community standards. With the case in this posture, the Division failed to prove that the show was obscene.

403 So.2d at 1374 (citations deleted, emphasis added). The district court in the case sub judice relied on *Golden Dolphin* to require expert evidence of contemporary community standards in all cases where there is no right to a jury trial. The reasoning of the *Golden Dolphin* court and the court below in this case is that a jury is a cross-section of the community, and is therefore aware of contemporary community standards. A defendant has the opportunity to question jurors about their knowledge of community standards in voir dire and can challenge those found wanting. A defendant who waives jury trial, the reasoning continues, cannot complain that a judge is unrepresentative of the community, but when there is no right to a jury trial a defendant has not waived his right to object to a judge's inability to ascertain contemporary community standards.

[1] There is a certain logic to this argument in that a jury forms a consensus opinion of contemporary community standards, but that a lone judge has only his own standard to rely on. The flaw in this reasoning is the incorrect premise that the jury determines contemporary community standards by a consensus of the jurors' individual standards, while a judge applies his own individual standard. This simply is not the case. There is a legal fiction that there is an objective contemporary community standard, that a jury looks to that contemporary community standard, and that a judge is just as competent as six jurors to be on notice of that objective standard. While this may seem a questionable legal fiction, it is one mandated by the United States Supreme Court, and it is one which we must deal with. This tenuous but controlling rationale is expressed in *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir.1983):

> The parties may introduce relevant evidence of the prevailing community standard. But even if such evidence is adduced, the trier may nonetheless disregard it and rely exclusively on his own knowledge of the views of the average person in the community when making the required determination. Although appellate courts are required to exercise *de novo* review as to the preliminary substantive requirement that the material be "hardcore" pornographic in nature, the trier's finding that the material is non-obscene is virtually shielded from appellate scrutiny, at least absent evidence that it is so clearly unreasonable as to amount to abuse of discretion. The principal reason for this posture on appeal is that under *Miller* the trier of fact is at liberty to

identify and apply community standards as he sees them, unchecked by any definition of the relevant community (except that it may not extend to the entire nation) or by any more precise benchmarks. *To this must be added our tradition that it is for the trial judge or jury, not the appellate court, to find the facts, and the dubious assumption that the triers have their fingers on the pornographic pulse in the community, enabling them to determine whether specific material has crossed the line from being tolerated to being patently offensive.*

Id. at 136 (citations deleted, emphasis added). *See also United States v. Merrill*, 746 F.2d 458 (9th Cir.1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 926, 83 L.Ed.2d 938 (1985). "[A]lthough evidence regarding contemporary community standards is admissible, it is not necessary. The trier of fact is assumed to be inherently familiar with and capable of applying those views." 746 F.2d at 464 (bench trial—defendant waived trial by jury). Dubious though the assumption may be, it is one made by the highest court in this land, and we likewise can find no basis for distinguishing between the competence of a judge and a jury to ascertain the contemporary standards of the community wherein they sit. The *Golden Dolphin* court is correct that when a judge "affirmatively asserts his incapacity to discern community standards in the absence of evidence thereof, then it would be incumbent upon the state to present such evidence," 403 So.2d at 1374, but in that instance the judge has refuted the "dubious assumption." If anything, a defendant may be more protected when a judge is the trier of fact, since, presumably, a judge is aware of his duty to assert his incapacity if such is the case, whereas jury, absent an

instruction on such an obligation (an instruction we doubt will ever be mandated), is presumably unaware of such an obligation.

The *Golden Dolphin* court is also correct in noting that independent testimony as to community standards is certainly admissible if either party so desires. "If the government does not present evidence . . . it must be prepared to have the [trial judge acting as trier of fact] declare that, by [his] lights, the material is not self-evidently offensive to the community." *United States v. Various Articles of Merchandise, Seizure No. 170*, 750 F.2d 596 (7th Cir. 1984).

[2] Our holding is best summed up by Judge Sharp's dissent in *Golden Dolphin:*

> The general rule that a trial judge, sitting as a trier of fact, and without hearing any testimony regarding contemporary community standards, may apply what he has determined to be the common conscience of the community has been the law in our sister courts for some time.
>
> Absent a showing by the defense at trial that the judge trying the case is unaware of the community standards, I see no reason why the trial judge or hearing officer should not be able to make the obscenity determination by examining the challenged activity and applying his own knowledge of the community standards. Trial judges, like juries, are deemed competent to know community standards and apply them in other contexts. No different rule should be evolved for obscenity cases without express guidance from our two Supreme Courts.

403 So.2d at 1375 (footnotes deleted). There is no express guidance from the United States Supreme Court; we offer no different rule either.

[3] Florida Literary consistently argues that we lack conflict jurisdiction in this case. Conflict with the decision below is based primarily on the similar case of *Collins v. State Beverage Department*, 239 So.2d 613 (Fla. 1st DCA 1970). Florida Literary argues in this case that the *Miller* decision requires expert testimony when a judge sits as a trier of fact because the *Miller* court's analysis of contemporary community standards is framed in terms of jury determination. Florida Literary urges that this emphasis on jury determination demonstrates that the Supreme Court endorses the argument that a jury is inherently more capable than a judge to determine contemporary community standards. Based on its view of the *Miller* decision, Florida Literary argues that the *Collins* decision, decided prior to *Miller*, is no longer valid precedent, since the *Collins* court's decision which does not require evidence as to obscenity was rendered obsolete by the *Miller* decision. As discussed *supra*, *Miller* cannot be read to make this distinction between jury and nonjury trial. Nor can *Collins* be distinguished on the ground that *Collins* does not require expert testimony regarding the *ultimate* conclusion as to prurient interest, whereas *Golden Dolphin* and the instant decision require testimony as to community standards *to aid in reaching* the ultimate conclusion regarding prurience. This is a distinction without a difference. Testimony as to whether material is prurient under contemporary community standards must inherently include a delineation of what those community standards are. Obscenity is a troublesome area of the law for the courts and any inexactitude in language in

Collins must be attributed to the unsettled nature of the law rather than a studied choice of words on which a distinction may be made. Quite simply, the question is whether or not expert testimony is required to support a conclusion of prurience under contemporary community standards; *Collins* said no, *Golden Dolphin* and the instant case said yes. There is conflict.

Accordingly, the decision of the district court is quashed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

ADKINS, OVERTON and McDONALD, JJ., concur.

BOYD, C.J., dissents with an opinion, in which SHAW, J., concurs.

BOYD, Chief Justice, dissenting.

I dissent and would approve the decision of the district court of appeal. That court held that in a case where no right of jury trial exists for benefit of the defendant, a trial court's finding of obscenity in the absence of any testimony defining "contemporary community standards" is not supported by legally sufficient evidence. The concept of due process of law teaches us that to allow a lone judicial officer to make such a finding based only on subjective judgment is a dangerous precedent, however correct or well-exercised that judgment may have been in this particular case. Where freedom of the press is subject to being affected, legal procedures should be restrictively tailored to achieve the government's purpose without infringing upon the

protected liberty. I also agree with Judge Jorgenson that to allow jury trials in such cases would obviate the problem of evidence of contemporary community standards.

SHAW, J., concurs.

APPENDIX 2

FLORIDA LITERARY DISTRIBUTING CORPORATION, a Florida corporation, d/b/a Rich's News-Stand, John Doe, salesperson of a retail bookstore located at 180 Northeast 79th Steet, Miami, Florida individually jointly and severally, et al., Appellants,

v.

STATE of Florida, ex rel., Jose GARCIA-PEDROSA, as City Attorney of the City of Miami of the State of Florida, Appellees.

Nos. 83-2877, 84-253.

District Court of Appeal of Florida,
Third District.

Jan. 2, 1985.

Appeal was taken by distributor from a final judgment of the Circuit Court, Dade County, David L. Levy and Joseph M. Nadler, JJ., finding magazines obscene and rendering a permanent injunction enjoining and restraining distributor from showing, offering for sale, or exhibiting magazines to public. The District Court of Appeal, Baskin, J., held that absent a presentation to trial court of testimony defining contemporary community standards of obscenity, evidence was insufficient to support trial court's ruling that magazines in question were obscene, thus precluding issuance of an injunction enjoining and restraining distributor from

showing, offering for sale, or exhibiting magazines to public.

Reversed and remanded.

Jorgenson, J., concurred and filed opinion.

1. Injunction —128(10)

Absent a presentation to trial court of testimony defining contemporary community standards of obscenity, evidence was insufficient to support trial court's ruling that magazines in question were obscene, thus precluding issuance of an injunction enjoining and restraining distributor from showing, offering for sale, or exhibiting magazines to public. West's F.S.A. § 847.011(11).

2. Injunction —128(10)

Presentation of expert testimony defining contemporary community standards of obscenity is essential in injunction cases where no right to a jury trial exists. West's F.S.A. § 847.011(11).

Joel Hirschhorn and Harry M. Solomon, Miami, for appellants.

Lucia A. Dougherty and Leon M. Firtel, Miami Beach, and Gisela Cardonne, Miami, for appellees.

Before BARKDULL, BASKIN and JORGENSON, JJ.

BASKIN, Judge.

Florida Literary Distributing Corporation (Florida Literary) appeals a final judgment finding four magazines obscene and granting a permanent injunction enjoining and restraining appellant from showing, offering for sale, or exhibiting the magazines to the public.

[1] Florida Literary contends on appeal, as it did at the non-jury proceeding below, that appellee failed to meet its burden of proof, and that appellee's failure to offer testimony defining contemporary community standards of obscenity in Dade County precluded the issuance of an injunction as a matter of law. We agree and reverse upon a holding that absent a presentation to the trial court of testimony defining contemporary community standards of obscenity, the evidence was insufficient to support the trial court's ruling that the materials in question are obscene. *See Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, *reh'g denied*, 414 U.S. 881, 94 S.Ct. 26, 38 L.Ed.2d 128 (1973); *Golden Dolphin No. 2, Inc. v. State, Division of Alcoholic Beverages & Tobacco*, 403 So.2d 1372 (Fla. 5th DCA 1981); § 847.011(11), Fla. Stat.(1981).

[2] We agree that:

> While it may be said that the trier of fact will know obscenity when he sees it (to paraphrase Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), how exactly can an appellate court determine if he has properly identified the relevant community standards? *See* concurrence in part and dissent in part of Justice Stevens in *Marks v. United States*, 430 U.S. 188, 198, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 n. 7 (9th Cir.1977). The presentation of expert testimony defining contemporary community standards is essential in cases where no right to a jury trial exists. *See Golden Dolphin.*

Reversed and remanded for further proceedings consistent with this opinion.

JORGENSON, Judge, concurring.

I write separately only to suggest that trial courts should consider the use of a jury in proceedings of this nature.

While a defendant ordinarily is not entitled to a jury trial in an action in equity which seeks an injunction, *For Adults Only, Inc. v State ex rel. Gerstein*, 257 So.2d 912 (Fla. 3d DCA 1972), *cert. denied*, 292 So.2d 592 (Fla. 1974), *disapproved on other grounds, Ladoga Canning Corp. v. McKenzie*, 370 So.2d 1137, 1140 (Fla.1979), it is within the trial court's discretion to permit a jury to decide the issues in a case involving equitable relief. *Berg v. New York Life Insurance Co.*, 88 So.2d 915 (Fla.1956); *Sanitary Linen Service Co. v. Executive Uniform Rental, Inc.*, 270 So.2d 432 (Fla. 3d DCA 1972); *St. Sophia Greek Orthodox Community v. Vamvaks*, 213 So.2d 313 (Fla. 3d DCA 1968). Cases in which contemporary community standards are applied to facts in controversy are particularly suitable for juries because "[a] jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person." *McKinney v. Alabama*, 424 U.S. 669, 688, 96 S.Ct. 1189, 1199-1200, 47 L.Ed.2d 387, 401 (1976) (Brennan, J., concurring) (quoting *Kingsley Books, Inc.*

v. Brown, 354 U.S. 436, 448, 77 S.Ct. 1325, 1331, 1 L.Ed.2d 1469, 1478 (1957) (Brennan, J., dissenting)). The use of a jury in this case would have obviated the necessity of the introduction of testimony defining contemporary community standards. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590, *reh'g denied*, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, *reh'g denied*, 414 U.S. 881, 94 S.Ct. 27, 38 L.Ed.2d 128 (1973), *cert. denied*, 418 U.S. 939, 94 S.Ct. 3227, 41 L.Ed.2d 1173, *motion for leave to file petition for reh'g denied*, 419 U.S. 887, 95 S.Ct. 163, 42 L.Ed.2d 133 (1974); *Golden Dolphin No. 2, Inc. v. State, Divison of Alcoholic Beverages & Tobacco*, 403 So.2d 1372 (Fla. 5th DCA 1981).

Supreme Court, U.S.
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No. 85-2141

In the Supreme Court of the United States

OCTOBER TERM, 1985

FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,
Petitioners,

vs.

CITY OF MIAMI,
a municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In a civil non-jury suit to enjoin the distribution of pornographic magazines, in which the challenged magazines are themselves introduced into evidence, do the First and Fourteenth Amendments require the government to also present expert testimony at trial concerning prevailing contemporary community standards, or may the judge determine those standards and apply them to the challenged materials in accordance with requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 492 (1973)?

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No. 85-2141

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FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,
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vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 486 So.2d 569 (Fla. 1986) and is contained in the Petitioners' Appendix at pp. 1-13; the opinion of the Florida Third District Court of Appeals is reported at 460 So. 1028 (Fla. 3d DCA 1985) and is contained in Petitioners' Appendix at pp. 14-18.

JURISDICTION

The Judgment of the Florida Supreme Court was entered on April 3, 1986. The jurisdiction of this Court has been invoked by Petitioners under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent accepts Petitioners' statement of the case with the exception of the last sentence of the third paragraph of Petitioners' statement. The trial judges below did not respond to Petitioners' "inquiry" because it is unprecedented in Florida—and probably every other jurisdiction—for a party during a trial to interrogate (or "*voir dire*") a judge about his "competence" to decide a dispute before him.

SUMMARY OF ARGUMENT

There is no Constitutional or practical justification for requiring the government in a civil injunction proceeding to present "expert" testimony regarding contemporary community standards when the challenged materials are introduced into evidence, because a judge is as capable as a jury or an "expert" of applying the *Miller* standard to the materials in evidence before him.

ARGUMENT

Respondent opposes the Petition for Writ of Certiorari because the Florida Supreme Court correctly construed and applied the decisions of this and the other Federal courts which were dispositive of the issue raised by the Petioners below. The Florida Supreme Court correctly held that in a non-jury civil trial in which the government seeks an injunction halting the distribution of obscene literature, expert testimony is not Constitutionally required to prove that the challenged materials violate contemporary community standards.

In a non-jury civil trial to enjoin the distribution of pornographic materials, in which the challenged materials are themselves presented to the judge as evidence, the petitioners would nevertheless interpret the United States Constitution to compel the government to present "expert" testimony showing that the materials would be unacceptable to the community's average person. Respondent respectfully suggests that such a Constitutional requirement would merely serve to complicate the litigation and would not provide the Defendant with any greater protection than that which is already provided by this Court's precedent and by Section 847.011, Fla.Stat. (1981).

Both Respondent and Petitioners had the opportunity to present expert testimony at trial and neither party availed themselves of that right, presumably because both the government and Petitioners knew that such "expert" testimony would be spurious since the materials were themselves in evidence and were patently obscene. *See, United States v. Various Articles of Obscene Merchandise,* 709 F.2d 132, 136 (2d 1983). Indeed, in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446 (1973), this Court stated with respect to such "expert" testimony that:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. . . . No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. "Simply stated, hard core pornography . . . can and does speak for itself."

Paris Adult Theatre I, supra at footnote 6 (citations omitted). There is no legal or scientific support for Petitioners' proposition that an elected judge is *less* capable than a jury of discerning the community's pornographic standards, and therefore no reason for concluding that the First Amendment requires the government to provide "expert" testimony on local pornography standards to a judge but not to a jury.[1] In *Paris Adult Theatre I, supra,* this Court

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1. At page 8 of their brief Petitioners refer to the fact that Florida's circuit judges are elected, presumably in an effort to denigrate their judicial capacities in the eyes of the (ap-

(Continued on following page)

did not distinguish between jury and non-jury trials when it held that "expert" testimony on community standards was *not* required when the challenged materials are themselves placed into evidence:

> Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. [Citations omitted.] The films, obviously, are the best evidence of what they represent. [Footnote omitted.] "In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient themselves for the determination of the question." Ginzberg v. United States, 383 U.S. 463, 465, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966).

Id. at U.S. 56, S.Ct. 2634, L. Ed. 2d 456. *See also, Kaplan v. California*, 413 U.S. 115, 121, 93 S.Ct. 2680, 37 L.Ed. 2d 492 (1973). Petitioners are also in error when they assert at page 6 of their brief that *Miller* emphasized the requirement of a jury to decide what the community's standards are. The Court's statement in *Miller* (quoted at page 6 of Petitioners' brief) emphasized the need to apply an "average person" test, *not* the need for a jury to apply it. Contrary to Petitioners' statement at page 7 of their brief, the "basic premise" underlying *Miller* was not that a *jury* must decide whether the materials violated contemporary community standards, but rather that the trier-of-fact

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Footnote continued—

pointed) Federal appellate courts. Yet whatever the correlation between judicial election and judicial scholarship, in this nation it is fundamental that elections assure that those elected are familiar with and responsive to community standards and values; thus the election of Florida trial judges *undermines* rather than bolsters Petitioners' arguments that a trial judge necessarily requires "expert" testimony to know that the hard-core pornography before him violates his community's standard.

(whether judge or jury) would apply an objective test based on the community's norms.

When Petitioners assert that "expert" testimony on community pornographic standards should be Constitutionally required for civil bench trials, they can only rely on the opinion of the Florida Third District Court of Appeals in *Florida Literary Distributing Corp. v. State*, 460 So.2d 1028, 1029 (Fla. 3d DCA 1985). But as noted by the Florida Supreme Court, the Third District's opinion was contrary to the case law. *See, City of Miami v. Florida Literary Distributing Corp.*, 486 So.2d 569 (Fla. 1986), and *also see Alexander v. Howard*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed. 2d 933 (1973), *reh. den.* 414 U.S. 881, 94 S.Ct. 29, 38 L.Ed. 2d 128 (1973); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), *cert. denied* 105 S.Ct. 926 (1985); *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 136 (2d Cir. 1983); *For Adults Only, Inc. v. State ex rel. Gerstein*, 257 So.2d 912 (Fla. 3d DCA 1972), *cert. denied* 292 So.2d 592 (Fla. 1974), disapproved on other grounds; *Ladoga Canning Corp. v. McKenzie*, 370 So.2d 1137, 1140 (Fla. 1979). *See also, Kaplan v. California*, 413 U.S. 115, 118, 93 S.Ct. 2680, 37 L.Ed. 2d 492 (1973) (affirming a criminal obscenity conviction even though the state did not present expert testimony on the material's lack of redeeming social value, relying on *Smith v. California*, 361 U.S. 147, 164-165, 80 S.Ct. 215 (1959), 4 L.Ed. 2d 205 (Frankfurter, J., concurring), and *Ginzberg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966) (for the proposition that the introduction of the materials themselves are a sufficient basis for determination of the issue).

The issue raised by Petitioners is a small tempest in an even smaller teapot, for a local judge is just as capable

of implementing *Miller* as a local jury, and *neither* the judge nor the jury requires "expert" testimony to decide that hard-core pornographic materials which are in evidence are considered obscene by the community.[2]

As the Florida Supreme Court noted in its opinion, *Id.* at 570, the concept of an "average man" applying contemporary standards is, if anything, more difficult to square with the realities of a jury trial than with the realities of a bench trial. Indeed, the "dubious assumption" cited by the Florida Supreme Court was that a *jury* is able to objectively apply the *Miller* standard, with or without expert testimony, not (as implied by Petitioners in their brief) that *judges* are unable to apply that standard without expert testimony. Judges constantly endeavor to disregard their personal predilections and apply objective legal standards (such as the "reasonable man" standard), while lay juries have no such training or experience. As the Florida Supreme Court stated in its opinion, "If anything, a defendant may be more protected when a judge is the trier of fact, since, presumably, a judge is aware of his duty to assert his incapacity if such is the case. . . ." *Id.* at 571-572.

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2. If either side wishes to present "expert" testimony on community standards, they are entitled to do so (which would no doubt compel the other side to hire an expert to give a conflicting opinion), but such testimony should not become a First Amendment requirement. If the government decides not to use such testimony, it assumes the risk of not meeting its burden of proof and so losing its case. See, United States v. 2,200 Paperback Books, 565 F.2d 566, 570-571 (9th Cir. 1977); Golden Dolphin No. 2, Inc. v. State, 403 So.2d 1372 (Fla. 5th DCA 1981).

As this Court stated in *Miller*, 413 U.S. at 33, the reason for requiring that pornography be judged from the perspective of "the average person, applying contemporary community standards" is to assure that the challenged material is judged by its impact on *average* rather than particularly isolated or jaded community members. That purpose can be accomplished as well by a judge, who must serve the entire community, as by six randomly selected jurors who may be completely unfamiliar with community standards, are perhaps overly sensitive "or insensitive" to pornographic materials, and certainly lack training and experience in the application of "objective" legal standards. Thus, if expert testimony on community standards is to be made a First Amendment requirement, that requirement should apply to jury trials as well as non-jury trials, which would require this Court to reverse its decision in *Paris Adult Theatre I, supra.* For if *Paris Adult Theatre I* is allowed to stand, the government is permitted to successfully prosecute and convict a defendant of a crime, *without* providing "expert" testimony on prevailing community standards, and so it must logically follow that expert testimony is not required of the government when it is seeking merely a civil injunction rather than a criminal conviction.

Underlying Petitioners' argument is the assumption that a judge cannot fairly apply the *Miller* standard. For a judge to fulfill his duty under *Miller*, Petitioners believe, converts the trial judge into an autonomous censor. Yet Justice Brennan has already responded to such attacks on *this* Court's ability to independently judge pornographic materials, *without* a jury and usually *without* expert testimony about prevailing community standards:

> Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as "censor" or "super-censor." In judging alleged obscenity the Court is not more "censoring" expression than it has in other cases "censored" criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech.

Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 72 L.Ed. 2d 793, 799 (1964). The implications of Petitioners' arguments—that judges are less willing than lay jurors to abide by First Amendment principles and this Court's precedent—it is surely counterintuitive, and Petitioners offer no evidence to support that claim. Moreover, given the requirement of independent appellate review, *see Miller,* 413 at 25, a trial judge cannot capriciously "censor" protected materials even if they were inclined to do so. Hard-core pornography "can and does speak for itself," *U.S. v. Wild,* 422 F.2d 34, 36 (2d Cir. 1970), *cert. denied,* 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed. 2d 152 (1971); *Jacobellis v. Ohio, supra,* and since the materials are placed into evidence, the appellate courts can assure that the judge is *not* acting capriciously. *See Miller, supra,* 413 at 25.

For thirty years this Court has wrestled with the problem of defining obscenity. The current standard was established in *Miller,* adopted in Florida in *Rhodes v. State,* 283 So.2d 351 (Fla. 1973), and is applied in

Florida through Sec. 847.011, Fla.Stat. (1981). Perhaps no one is perfectly satisfied with the "average person" test, but after three decades of argument it is now obvious that a "bright line" approach to the problem of obscenity, e.g. to open the floodgate, as urged by Justice Douglas in *Miller*, has been rejected by a majority of this Court. Given the majority's views, it would not make the "average person" test any more precise to engraft onto *Miller* a requirement that the government present "expert" testimony on prevailing community values, since the "experts" would themselves still be required by *Miller* to presume to speak about and for the community's mythical "average person." As noted by Judge Sharpe in his dissent in *Golden Dolphin No. 2, Inc. v. State*, 403 So.2d 1372 (Fla. 5th DCA 1981) (quoted with approval by the Florida Supreme Court below), it does not matter whether the trier of fact is a judge or a jury if both must apply the objective standard mandated by *Miller*, and the same can be said for any "experts" called to testify. If *Miller* suffers from a "dubious" premise it is that in large urban areas the concept of "community" is artificial, a term meaning little more than a geographic group of individuals with very distinct views about pornography. To expect a judge *or a jury* to literally discover and apply the views of the "average" community member is thus to expect the impossible. That is an unwarranted criticism of *Miller*, however, which arises from an overly literal application of the "average person" concept. The "average person" concept actually promotes intellectual discipline by urging the trial court to express the community's prevailing and customary values rather than its own. More importantly, such a criticism of *Miller* can hardly be answered by requiring the judge or jury to listen to the testimony of a

paid "expert" who claims intimate knowledge of the habits and views of a fictional person. Stated very simply, if one is skeptical of a legal test which rests on the pornographic tastes of a fictional "average man," then one ought to be even *more* skeptical of Petitioners' proposal which advocates the compulsory use of paid experts to *describe* those tastes.

Finally, there is no need for the rule urged by Petitioners because if a judge is *not* able to ascertain community standards he can simply request testimony or evidence on that issue, or impanel an advisory jury, or simply rule against the government on the grounds that the government as plaintiff has the burden of proving each of the *Miller* requirements including the requirement that the materials are judged obscene by the community's "average" person. *See United States v. Various Articles of Merchandise*, 750 F.2d 596 (7th Cir. 1984); *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 136 (2d Cir. 1983); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984); *United States v. 2,200 Paperback Books*, 565 F.2d 566 (9th Cir. 1977).

CONCLUSION

The Petition for a Writ of Certiorari should be denied because the Florida Supreme Court followed the precedent of this Court in reaching its decision. Jurisdiction is accordingly lacking.

Respectfully submitted,

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APPENDIX

Section 847.011, Fla.Stat. (1981)

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—

(1)(a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent use, or purporting to be for indecent use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner

knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent use, or purporting to be for indecent use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of violating this subsection, thereafter violates any of its provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. In any prosecution

for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who knowingly promotes, conducts, performs, or participates in an obscene, lewd, lascivious, or indecent show, exhibition, or performance by live persons or a live person before an audience is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who, after having been convicted of violating this subsection, thereafter violates any of its provisions and is convicted thereof is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(6) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this

section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(7) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(8)(a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney or attorney for a municipality in the name of the state upon the relation of such state attorney or attorney for a municipality.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining

the person complained of until final hearing or further order of the court. Whenever the relator state attorney or attorney for a municipality shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within 3 days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this subsection, no bond or undertaking shall be required of the state attorney or the municipality or its attorney before the issuance of a restraining order provided for by paragraph (b), and there shall be no liability on the part of the state or the state attorney or the municipality or

its attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this subsection, is chargeable with knowledge of the contents and character thereof.

(9) The several sheriffs and state attorneys shall vigorously enforce this section within their respective jurisdictions.

(10) This section shall not apply to the exhibition of motion-picture films permitted by s. 847.013.

(11) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(12) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations.

History.—ss. 1-11, ch. 61-7; s. 1053, ch. 71-136; ss. 1A-3A, 4, 5A, 6, ch. 71-337; s. 171, ch. 7-355; s. 34, ch. 73-334.
cf.—s. 235.09 Obscenity on educational buildings.

s. 933.02 Issuance of search warrant.